Supreme Court, U.S.
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No. _____

In the

Supreme Court of the United States

Charles H Bond

Petitioner,

v.

Franchise Tax Board;
Gerald H. Goldberg;
And Leslie R.

Respondents.

On Petition For Writ Of Certiorari
To The Ninth Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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Questions Presented for Review

1. DOES THE LOWER COURTS' DECISION CONFLICT WITH THIS COURT'S DECISIONS IN ***Hibbs v. Winn, 124 S.Ct. 2276 (2004)***, BY CONCLUDING THAT THE COURT WAS DEPRIVED OF SUBJECT MATTER JURISDICTION PURSUANT TO THE TAX INJUNCTION ACT, U.S.C. 28 §1341?

2. DOES THE LOWER COURTS' DECISION CONFLICT WITH THIS COURT'S DECISION ***Monell v. Department of Social Services of the City of New York (1978) 436 U.S. 658,*** BY CONCLUDING THAT THE DEFENDANT STATE AGENCY IS NOT A "PERSON" UNDER §1983?

3. DOES THE LOWER COURTS' DECISION CONFLICT WITH THIS COURT'S DECISION IN ***EX PARTE YOUNG, 209 U. S. 123, 28 S.CT. 441 (1908), i.e.,*** THE COURT'S ELEVENTH AMENDMENT IMMUNITY AND "ARM OF THE STATE" PRECEDENT, BY CONCLUDING, THAT DEFENDANTS WERE ENTITLED TO ELEVENTH AMENDMENT IMMUNITY?

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BRIEF FOR THE PETITIONER

OPINION BELOW

The decision of the Ninth Circuit Court of Appeals rejecting Petitioner's appeal is unreported. The Memorandum Decision is reproduced at Appendix "C"

JURISDICTION

The Memorandum Decision of the Ninth Circuit Court of Appeals was filed on March 29th, 2006. The jurisdiction of this Court rests on 28 U.S.C. §1257(a).

STATEMENT

On July 28th, 2004, Petitioner brought his Federal cause of action pursuant 42 U.S.C. § 1983, and provided the District Court with federal jurisdiction under 28 U.S.C. §§ 1331 and 1343. In his Complaint, Petitioner alleged that the Defendants Franchise Tax Board (FTB), Executive Director Gerald H. Goldberg (Goldberg) and Leslie R. (collectively, "Defendants"), violated [his] clearly established Due Process and First Amendment rights secured by the United States Constitution. Viz:

Under the First Cause of Action, Petitioner challenged the Defendants practices and policy in not affording [him] an "administrative review" or a "due

process hearing" in order to challenge Defendants findings and conclusions of law concerning Petitioner's tax returns for the years of 2000, 2001, 2002, and 2003. Defendants had concluded that the tax returns were "frivolous and invalid." ***Prior*** to the filing of the Complaint, Defendants never provided Petitioner with any kind of "process" or "remedy" to resolve the Defendants findings or conclusions. Petitioner repeatedly requested the Defendants for an "administrative review" and for a "due process hearing" in order to challenge the returns in question.

Petitioner responded to the Defendants findings and demonstrated that the returns, in question, where not "frivolous or invalid." Defendants never rebutted Petitioner's defense nor did Defendants provide a "process" [or] "remedy" in order to challenge their findings.

In his Complaint, Petitioner demonstrated that the Defendants actions and inactions violated [his] "due process" and [his] "procedural due process" rights as clearly established by the United States Supreme Court in *Mathews v. Eldridge (1976) 96 S.Ct. 893; Morrissey v. Brewer (1972) 92 S.Ct. 2593; and Mullane v. Cent. Hanover Bank & Trust, 339 U.S. 313 (1950).*

Under the Second Cause of Action, Petitioner challenged Defendants findings and conclusions of law that the tax returns of 2000, 2001, 2002, and 2003, constituted a "frivolous and invalid" return based on a "vitiated jurat." Petitioner demonstrated to Defendants that [his] writing "all rights reserved" in the jurat of the Tax returns in question, did not vitiate the jurat and make

the returns "frivolous and invalid." Defendants never rebutted Petitioner's First Amendment defense nor did Defendants provide a "process" [or] "remedy" to challenge or resolve Defendants findings and conclusions of law.

In his Complaint, Petitioner demonstrated that Defendants violated [his] Fifth Amendment right to due process and [his] First Amendment right to Free Speech by penalizing [him] for writing "all rights reserved" in the jurat on the Tax returns in question.

Under *Todd v. U.S., 849 F.2d 365 (9th Cir. 1988)*, it is a violation of First Amendment right to conclude that writing, "all rights reserved" in the jurat would vitiate the jurat and make the return frivolous and invalid. Only inaccurate or incomplete information on a return would constitute a "frivolous" and "invalid" return. Expressing the writing "all rights reserved" in the jurat – was invocation of Petitioner's First Amendment right to "Free Speech." The right to "free speech" [is] a "clearly established constitutional right." Cf. *Hustler v. Falwell, 485 U.S. 46 (1988).*

On January 28th, 2005, Petitioner was before the District Court on Defendant's Motion To Dismiss the Complaint and Petitioner's Opposition to the Motion To Dismiss. **The District Court found that Petitioner's "claims for injunctive and declaratory relief satisfied both elements of *Ex Parte Young, 209 U.S. 123 (1908)*;" that:**

> **"[Bond] is challenging the constitutionality of the FTB's policy of not affording 'due process hearings' which would allow him to dispute**

the FTB's findings concerning his tax returns before he must file a personal income tax return. Because the FTB has not instituted such a hearing, the alleged violation of Bond's due process rights continues to occur and any relief, both declaratory and injunctive, would necessarily be prospective."

The District Court further found that:
"Bond also alleges that his free speech rights have been violated by the FTB's determination that the statement 'all rights reserved' on the returns vitiated the jurat and rendered them frivolous and invalid. The FTB has not changed its position regarding the vitiated jurat, therefore, the alleged violation of Bond's free speech rights continues. Injunctive and declaratory relief on this claim would be prospective because it would require future action on the part of the Defendants."
See, District Court's ruling of February 3rd, 2005, at Appendix – Exhibit "A". Page 7a.

However, the District Court dismissed the Complaint because the Court lacked subject matter jurisdiction pursuant to the Tax Injunction Act, § 1341, and that Defendants were entitled to Eleventh Amendment immunity. The Ninth Circuit agreed and denied Petitioner's appeal. See, Memorandum decision – Appendix, Exhibit "C". (Page 47a)

REASONS FOR GRANTING THE PETITION

1. As to the ***First Question***, this Honorable Court should grant review because the lower Courts'

REASONS FOR GRANTING THE PETITION (Continued)

decision conflicts with this Court's decision in ***Hibbs v. Winn, 124 S.Ct. 2276 (2004),*** by concluding that the Court was deprived of subject matter jurisdiction pursuant to the Tax Injunction Act, U.S.C. § 1341. Supreme Court Rules, Rule 10 (c), i.e., "has decided an important federal question in a way that conflicts with relevant decisions of this Court".

2. As to the ***Second Question***, this Honorable Court should grant review because the lower Courts' decision conflicts with this Court's decision in ***Monell v. Department of Social Services of the City of New York (1978) 436 U.S. 658,*** in concluding that Defendant State Agency in not a "Person" under § 1983. Supreme Court Rules, Rule 10 (c), i.e., "has decided an important federal question in a way that conflicts with relevant decisions of this Court.

3. As to the ***Third Question***, this Honorable Court should grant review because the lower Courts' decision conflicts with this Court's decision in ***EX PARTE YOUNG, 209 U.S. 123, 28 S.CT. 441 (1908),*** i.e., the Court's Eleventh Amendment Immunity and "arm of the State" precedent, by concluding that Defendants were entitled to Eleventh Amendment Immunity. Supreme Court Rules, Rule 10(c), i.e., "has decided an important federal question in a way that conflicts with relevant decisions of this Court."

ARGUMENTS

1. THE LOWER COURTS ERRED IN CONCLUDING THAT THE COURT WAS DEPRIVED OF SUBJECT MATTER JURISDICTION PURSUANT TO THE TAX INJUNCTION ACT, U.S.C. 28 §1341.

The lower Courts' decisions that the Tax Injunction Act, § 1341, deprived it of subject matter jurisdiction and that Petitioner had "plain, speedy and efficient remedy" conflicts with this Court's decision in ***Hibbs v. Winn, 124 S.Ct. 2276 (2004)*** and the Ninth Circuit's ***own*** decision in ***Winn v. Killian, 307 F.3d 101.*** These two cases (decisions) are **the same.** To appreciate Petitioner's sentiment and position, Petitioner will present his argument in sequent to the Courts position and show that the Tax Injunction Act did not bar his Federal Complaint. Viz:

First and foremost, the District Court's determination that this Court's decision in *Hibbs v. Winn, 124 S.Ct. 2276 (2004)*, is "inapplicable" is incorrect. This determination is wholly foreclosed by the Ninth Circuit decision in *Winn v. Killian, 307 F.3d 1011*, and this Court affirming the ***Winn*** case in *Hibbs v. Winn*, supra.

The Ninth Circuit in ***Winn*** and this Court in ***Hibbs***, clearly held that a suit seeking "**prospective relief" and not seeking to "enjoin, suspend or restrain the assessment, levy or collection of any tax under State law" under 28 U.S.C. § 1341, "the Tax Injunction Act does not bar [the] suit" and "the action is justified in federal court."**

In the present case, Petitioner did not challenge

any of the types of procedures specified in the Tax Injunction Act, i.e., the assessment, levy, or collections of tax revenue, but was seeking to be afforded a "**due process hearing**" in order to challenge the Defendants findings and conclusions of law concerning the tax returns for the years of 2000, 2001, 2002, and 2003. Petitioner was seeking "**prospective relief,**" i.e., seeking to be afforded a "**due process hearing**" in order to challenge the FTB's findings and conclusions of law concerning the tax returns in question. Petitioner made a "**constitutional**" challenge to the FTB's findings.

Second, the District Court determined that "***Hibbs***, is inapposite to [Bond's] situation because he **did not challenge tax benefits,** but, rather, seeks to avoid filing a personal income tax return under California Revenue and Taxation Code § 18501." The District Court was incorrect.

Both ***Winn*** and Petitioner mounted a "**constitutional**" challenge to the respective Taxing Departments. ***Winn*** challenged a tax code alleging that the statute violated the **Establishment Clause** of the United States Constitution and sought "prospective relief."

Petitioner challenged the Defendants **practices and policies** in not affording [him] an **"administrative review" or a "due process hearing"** in order to challenge Defendants findings and conclusions of law concerning Petitioner's tax returns for the years in question. Petitioner demonstrated that the Defendants actions and inactions violated the Due Process Clause of the United States Constitution and violated [his]

"procedural due process" rights as clearly established by this Court, and sought "prospective relief."

Petitioner further demonstrated that Defendants violated [his] Fifth Amendment right to due process and [his] First Amendment right to Free Speech by penalizing [him] for writing "all rights reserved" in the jurat on the Tax returns in questions and sought "prospective relief."

Thus, ***Hibbs/Winn*** and Petitioner's case are not "inapposite." (1.) ***Winn*** and Petitioner mounted a **"constitutional"** challenge to the respective Taxing Departments. (2.) ***Winn*** and Petitioner did not challenge any of the types of procedures specified in the Tax Injunction Act. (3.) ***Winn*** and Petitioner sought "prospective relief."

Further, Petitioner **did not "seek to avoid filing a personal income tax return"** for the Tax years in question. Petitioner did file his income tax return for each year. It was Defendants' findings and conclusions of law concerning the filed Tax returns that triggered Petitioner's **"constitutional"** challenge as to each return. Petitioner repeatedly responded to Defendants findings and demonstrated that each Tax return was not "frivolous or invalid." It was the Defendants who never rebutted Petitioner's **"constitutional"** challenge to each Tax return and it was the Defendants who never provided a "process" [or] "remedy" in order to allow Petitioner to challenge their findings as to each Tax return filed.

Thus, the District Court's assertion that Petitioner sought "to avoid filing a personal income tax return" [is]

wholly inaccurate and incorrect. The record clearly demonstrates that Petitioner filed his Tax return for each year and challenged each year, respectively, as to the findings made by Defendants.

Third, the District Court's and Ninth Circuit's assertion that Petitioner had a "plain, speedy, and efficient remedy" in State Court [is] incorrect. Prior to the filing of this Complaint, Defendants never provided Petitioner with ***any kind of "process" [or] "remedy"*** to resolve the FTB's findings or conclusions.

Petitioner repeatedly requested the Defendants for an "administrative review" and for a "due process hearing" in order to challenge the returns in questions. Petitioner repeatedly responded to the FTB's findings and demonstrated that the returns, in question, where not "frivolous or invalid." Defendants never rebutted Petitioner's "**constitutional**" challenge nor did the Defendants provide a "process" [or] a "remedy" in order to challenge their findings. It was the Defendants who failed to provide a "remedy."

A **"judicial review"** in State Court would have been a ***"useless thing."*** This Court has held that "A state-court remedy is 'plain, speedy and efficient' **only if it 'provides the taxpayer with a full hearing and judicial determination' at which he or she may raise any and all constitutional objections to the tax."** See, *Rosewell, 450 U.S. at 514.*

Here, there was never **any kind of "process" [or] "remedy"** provided by the Defendants at any time or at

any level. As Justice Stevens stated in his dissent in ***Rosewell:*** **"The terms 'full hearing' and 'judicial determination' surely imply that the remedy may not be an empty ritual."** Id., at 533. In the present case, not only was the **remedy "an empty ritual,"** there was **"*nothing.*"**

Petitioner demonstrated, in his Complaint, **two clearly established constitutional violations**. It is ironic that the District Court agreed and found:

> **"That [Bond] is challenging the constitutionality of the FTB's policy of not affording 'due process hearings' which would allow him to dispute the FTB's findings concerning his tax returns before he must file a personal income tax return. Because the (Franchise Tax Board) has not instituted such a hearing, the *alleged violation of Bond's due process rights continues to occur* and any relief, both declaratory and injunctive, would necessarily be prospective,"**

[and found] that:

> **"Bond also alleges that his free speech rights have been violated by the FTB's determination that the statement 'all rights reserved' on the returns vitiated the jurat and rendered them frivolous and invalid. *The (Franchise Tax Board) has not changed its position regarding the vitiated jurat, therefore, the alleged violation of Bond's free speech rights continues.* Injunctive and declaratory relief on this claim would be prospective because it would require future action on the part of the Defendants,"**

and yet turn around and dismiss Petitioner's Complaint.

Thus, the District Court's assertion that it was deprived of jurisdiction pursuant to §1341 (the Tax Injunction Act) conflicts with this Court's decision in ***Hibbs v. Winn, 124 S.Ct. 2276 (2004)*** and the Ninth Circuit's assertion that Petitioner had a "plain, speedy and efficient remedy," is in conflict with its ***own*** decision in ***Winn v. Killian, 307 F.3d 101.***

2. THE LOWER COURTS ERRED BY CONCLUDING THAT THE DEFENDANTS ARE AN "ARM OF THE STATE" AND WERE ENTITLED TO ELEVENTH AMENDMENT IMMUNITY.

The District Court determined that "neither a state nor its governmental subdivisions are 'persons' for purposes of claims under § 1983," citing, ***Sable Com. Cal. V. Pacific Tel. & Tel., 890 F.2d 184 (9th Cir. 1989)***, and concluded that "Because the FTB is a subdivision of the government of California, the Court dismisses Bond's §1983 claim against the FTB." With all due respect, the District Court is incorrect. Viz:

The Franchise Tax Board (FTB) is not an "**arm of the state**" as contemplated in the ***Sable*** case. The FTB is authorized with exclusive "powers and duties" to administer the Revenue and Tax laws of California. See, Cal. Government Code, §§ 15700 and 15702. The FTB describes itself as a "**department**." See, the Franchise Tax Board web cite at www.ftb.ca.gov, under "Description" where they state, i.e., "The Franchise Tax Board is the ***department*** that administers state personal income taxes and corporations for the State of California. Thus, the FTB is neither a "subdivision" [nor] an "arm of

the state," but is a "person", i.e., ***"local governing body"*** as established by the Supreme Court. Viz a Viz:

First, this Court's evolving jurisprudence in the area of an **"arm of the state,"** clearly demonstrates that the Franchise Tax Board in **not an "arm of the state"** as determined by the District Court. As Justice Thomas eloquently stated in ***Northern Insurance Company of New York v. Chatham County Georgia, No. 04-1618 (Decided April 25, 2006)*:**

> "A consequence of this Court's recognition of preratification sovereignty as the source of immunity from suit is that only States and arms of the State possess immunity from suits authorized by federal law. ***See Alden, supra, at 740; Mt. Healthy City Bd. of Ed. V. Doyle, 429 U.S. 274, 280 (1977).*** **Accordingly, this Court has repeatedly refused to extend sovereign immunity to counties.** ***See Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391, 401 (1979);*** *id. At 401, n. 19 (gathering cases);* ***Workman v. New York City, 179 U.S. 552, 565 (1900); Lincoln County v. Luning, 133 U.S. 529, 530 (1890);*** *See also* ***Jink v. Richland County, 538 U.S. 456, 466 (2003)*** ("Municipalities, unlike States, do not enjoy a constitutionally protected immunity from suit"). **This is true even when, as respondent alleges here, 'such entities exercise a slice of state power.'"**

Lake Country Estates, supra, at 401."

It is clear from this Court's evolving jurisprudence that the "arm of the State" protection does not apply to the Franchise Tax Board. This District Court has

extended this constitutional protection to the Franchise Tax Board without this Court's authority or precedent. There is not a single decision by this Court which has ever concluded or established that the Franchise Tax Board is an **"arm of the state"** and **"enjoys a constitutionally protected immunity from suit."**

Moreover, **the Franchise Tax Board, are not strangers to lawsuits.** *Cf. Container Corp. of America v. Franchise Tax Board (1993) 103 S.Ct. 2933; Barclay's Bank PLC v. Franchise Tax Board, 512 U.S. 298 (1994); and Franchise Tax Board of California v. Hyatt (No. 02-42 – April 23, 2003).* This District Court has extended the blanket of immunity protection without this Court's authority or precedent.

Second, this Court in ***Monell v. Department of Social Services of the City of New York (1978) 436 U.S. 658,*** established that "history confirms that local governments were intended to be included among the 'persons' to which §1983 applies."

> The *Monell* Court further established that:
> "***Local governing bodies*** (and ***local officials*** sued in **their official capacities**), can, therefore, be sued directly under **§ 1983 for monetary, declaratory, and injunctive relief** in those situations where, as here, the action that is alleged to be unconstitutional, implements or executes a policy statement, ordinance, regulation, or decision officially adopted or promulgated by those whose edicts or acts may fairly be said to represent official policy.

> In addition, local governments, like every other §1983 **'person'** may be sued for constitutional deprivations visited pursuant to governmental 'custom' even though such custom has not received formal approval through the government's official decision-making channels."

Here, the statute itself, sets the FTB apart from being a "subdivision" [or] an "arm of the state," as a matter of law, i.e., §15702(a):

> "Any power granted to, or duty imposed on, the Franchise Tax Board by any provision of law may be exercised or performed by any officer or employee of the board authorized by the board unless it is expressly provided that the power or duty shall be exercised or performed only by the board itself."

Thus, the FTB is on its own and cannot be shielded by the State for **constitutional violations**, as here, and is a **"person"** to which §1983 applies [and] can be **"sued directly under § 1983 for monetary, declaratory, and injunctive relief."** ***Monell, supra.***

Therefore, the District Court erred in dismissing Appellant's §1983 claim against the FTB by concluding that the Franchise Tax Board is not a "person" within the meaning of §1983 and the Ninth Circuit's decision affirming said conclusion are in conflict with this Court's decision in ***Monell v. Department of Social Services of the City of New York (1978) 436 U.S. 658.***

3. THE LOWER COURTS ERRED BY CONCLUDING, THAT DEFENDANTS WERE ENTITLED TO ELEVENTH AMENDMENT IMMUNITY.

The District Court erred in shielding the Franchise Tax Board under the sovereign immunity protection of the Eleventh Amendment. It was Petitioner's position that the Franchise Tax Board's **voluntary appearance in federal court amounted to a waiver of its Eleventh Amendment immunity** and cited this Court's decision in ***Lapides v. Board of Regents of the University System of Georgia, 535 U.S. 613 (2002).***

The District Court took the position that in order to constitute a "waiver" under the Eleventh Amendment's immunity protection, a case must be "**removed from state to federal court**." The District Court determined that Petitioner "misinterpreted" this Court's decision in ***Lapides***. See, Court Reporter's Transcript of the January 28th, 2005, hearing; Appendix – Exhibit "B", page 27a. With respect to the District Court, it was the District Court who has misinterpreted this Court's decision in ***Lapides***, and as a result, the District Court is in conflict with its holding. Viz:

This Court in ***Lapides*** did not base its decision solely on the issue of a **"removal from state to federal court,"** i.e. this Court did not hold that the only issue which would constitute a Eleventh Amendment waiver [is] the "**removal from state to federal court**." The "removal from state to federal court" [is] what happened in the ***Lapides*** case.

This Court was very clear in the ***Lapides*** decision, i.e., "This Court has established the general principle that a State's **voluntary appearance in federal court amounts to a waiver of its Eleventh Amendment immunity**, [citations omitted], and has often cited with approval the cases embodying that principle."

Justice Breyer, speaking for the ***Lapides*** Court, went on to elaborate and stated, "more than a century ago this Court indicated that a State's **voluntary appearance in federal court amounted to a waiver of its Eleventh Amendment immunity.**" Citing, ***Clark v. Barnard 108 U.S. 436, 447, 2 S.Ct. 878, 27 L.Ed. 780 (1883).***

Thus, it is a Defendants ***"appearance in the federal Court"*** that amounts to a waiver of its Eleventh Amendment immunity, not just the "**removal from state to federal court.**" The District Court's determination is in conflict with this Court's decision in ***Lapides, supra.***

Also, the District Court erred in shielding Defendants Goldberg and Leslie R., with Eleventh Amendment protection from damages sought against them acting in their official capacities.

The Eleventh Amendment permits suits for "prospective injunctive relief" against **state officials** acting in violation of federal law. ***Ex Parte Young, 209 U.S. 123, 28 S.Ct. 441 52 L.Ed. 714 (1908).***

Here, Petitioner was seeking "prospective relief," i.e., affording Petitioner a due process hearing in order to challenge the FTB's findings and conclusions of law made on the tax returns in question, and his free speech

right regarding the alleged vitiated jurat. The Defendants are continuing to violate federal law, i.e., Petitioner's due process rights under the Due Process Clause and his free speech right under the First Amendment. **The District Court so held in the present case.**

In ***Frew Ex Rel. Frew v. Hawkins, 124 S.Ct. 899 (2003)***, this Court stated; "The Eleventh Amendment confirms the sovereign status of the States by shielding them from suits by individuals absent their consent. To ensure the enforcement of federal law, however, the Eleventh Amendment permits suits for **prospective injunctive relief against *state officials* acting in violation of federal law." Citing, Ex Parte Young, supra.**

The ***Frew*** Court went on to say: "This standard allows courts to order prospective relief ***Edelman v. Jordan, 415 U.S. 651 (1974)***, as well as measures ancillary to appropriate prospective relief, ***Green v. Mansour, 474 U.S. 64 (1985).***"

Therefore, the District Court erred in shielding Defendants Goldberg and Leslie R., with Eleventh Amendment protection from damages sought against them, acting in their official capacities.

The District Court further erred in finding that Defendants Goldberg and Leslie R., were entitled to **qualified immunity by acting in their individual capacities.**

The District Court's determination that Defendants Goldberg and Leslie R., were entitled to "qualified

immunity" is incorrect. Viz: Government officials enjoy **qualified immunity** from civil damages **unless their conduct violates "clearly established statutory or constitutional rights of which a reasonable person would have known."** ***Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)***. Here, Defendants Goldberg and Leslie R., enjoy no such immunity. Viz a Viz:

Petitioner demonstrated that the Defendants violated **"clearly established constitutional rights,"** i.e., the **"Due Process Clause"** as "clearly established" by the Supreme Court in ***Mathews v. Eldridge (1976) 96 S.Ct. 893; Morrissey v. Brewer (1972) 92 S.Ct. 2593; and Mullane v. Cent. Hanover Bank & Trust, (1950) 339 U.S. 306, 313,*** and the "Free Speech Clause" of the First Amendment as established by the Supreme Court in ***Hustler v. Falwell (1988) 485 U.S. 46.*** Ironically, **the District Court agreed with Petitioner in his claim**.

In ***Mathews***, supra, the Supreme Court established a balancing test to resolve procedural due process claims. ***Mathews*** does not involve claims arising in "property interest," as here - that fact is not significant. ***Valdivia v. Davis, 206 F.Supp. 2d 1068 (E.D. Cal. 2002)***. Procedural due process jurisprudence appears to employ the same test irrespective of the context in which the claim arises. ***Greenholtz v. Inmates, Nebraska Penal & Correctional Complex (1979) 99 S.Ct. 2100; Morrissey v. Brewer***, supra. To recognize that the same standard applies, is not to say that context is irrelevant. On the contrary, context is one of the elements to be considered in arriving at the conclusion as to what process is due.

An essential principle of due process is that a

deprivation of property "be preceded by notice and opportunity for hearing appropriate to the nature of the case.' ***Mullane***, supra. The fundamental requirement of procedural due process is that an individual be given an opportunity to be heard at a meaningful time in a meaningful manner. ***Mathews***, supra.

Here, Defendants knew all along that Petitioner was invoking these **"clearly established constitutional rights."** Petitioner repeatedly requested Defendants for an "administrative review" and for a "Due Process" hearing in order to challenge their findings and conclusions concerning the returns in question. Petitioner repeatedly responded to Defendants findings and demonstrated that the returns where not "frivolous or invalid." Defendants **never rebutted** Appellant's defense nor did the Defendants provide a "process" or "remedy" in order to challenge their findings. Defendants' action and inactions violated Petitioner's "due process" and "procedural due process" rights as "clearly established" by the Supreme Court. ***Mathews, supra; Morrissey, supra, and Mullane, supra.*** Defendants never provided any kind of "process" or "remedy" and knew all along that the U.S. Constitution and Supreme Court precedent requires such rights.

Petitioner further apprised the Defendants that their findings on the returns, in question, did not constitute a "frivolous invalid" return based on a "vitiated jurat." Petitioner demonstrated to Defendants that his writing "**all rights reserved**" in the jurat **did not vitiate the jurat and make the return "frivolous or invalid."**

Defendants **never rebutted** Petitioner's First Amendment claim nor did the Defendants provide a

"process" or "remedy" to challenge or resolve their findings.

Defendants violated Appellant's Fifth Amendment rights to due process and his First Amendment right to Free Speech by penalizing him for writing "**all rights reserved**" in the jurat on the Returns in question. In ***Todd v. U.S., 849 F.2d 365 (9th Cir. 1988)***, the government conceded that the taxpayer should not have been penalized for writing "signed involuntarily under penalty of statutory punishment" below the jurat. Under Todd – it is a violation of First Amendment rights to conclude that writing; "**all rights reserved**" in the jurat would vitiate the jurat and make the returns frivolous and invalid. Only inaccurate or incomplete information on a return would constitute a "frivolous" return. Expressing the writing "**all rights reserved**" in the jurat – was an invocation of Petitioner's First Amendment right to "**free speech**."

The right to "**free speech**" [is] a "**clearly established constitutional right**." Cases are to numerous to cite. In ***Hustler v. Farwell, 485 U.S. 46 (1988)***, the Supreme Court held:

> "At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinion on matters of public interest and concern. The freedom to speak one's mind is not only an aspect of individual liberty – and thus a good unto itself – but also is essential to the common quest for truth and vitality of society as a whole. **We have therefore been particularly vigilant to ensure that individual**

expressions of ideas remain free from governmentally imposed sanctions."

Defendants violated Petitioner's First Amendment right to "Free Speech." **Again, ironically the District Court agreed with Petitioner with this claim.** Thus, the District Court erred in finding that Defendants Goldberg and Leslie R., were entitled to **qualified immunity in acting in their individual capacities.**

In its Memorandum decision, the Ninth Circuit determined that "**defendant state agency...is entitled to Eleventh Amendment immunity," citing their decision in *Mitchell v. Franchise Tax Board, 209 F.3d 1111, 1115 (9th Cir. 2000).*** See, Memorandum. EXHIBIT "C", page 48a.

The Ninth Circuit's determination is incorrect and conflicts with this Court's precedent. In citing this Court's precedent in ***Mitchell***, at 1115, n.1, the Ninth Circuit stated: "The [Eleventh] amendment also bars suits against state agencies. *See Florida Dep't of State v. Treasure Salvors, Inc., 458 U.S. 670 (1981).*"

A closer reading of this Court's decision in ***Florida Dep't of State***, show a contrary determination. Viz: This Court stated: "**the process at issue is not barred by the Eleventh Amendment as a direct action against the State, because it was directed only at state officials**. Neither the fact that the State elected to defend on behalf of the officials, nor the fact that the District Court purported to adjudicate the State's rights, deprives that court of jurisdiction that had been properly invoked over other parties." Slip Op. Pp. 691-692. Here, Petitioner's

action, i.e., the constitutional violations alleged and claimed, was ***directed at state officials***, Defendants Gerald H. Goldberg, and Leslie R., i.e., **constitutional violations in which the District Court agreed.**

Thus, the Ninth Circuit's conclusion that the defendants were entitled to Eleventh Amendment immunity is contrary to this Court's precedent.

CONCLUSION

For the foregoing reasons, Petitioner prays that this Court grant the Petition for Writ of Certiorari and review the lower Courts decisions.

s/_____

Dated: May___, 2006 Charles H. Bond
Petitioner In Pro-Se

EXHIBIT "A"
DISTRICT COURTS DECISION

ENTERED

FEB— 3 2005

CLERK U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SANTA ANA OFFICE
By s/_____ DEPUTY

UNITED STATES DISTRICT COUT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. SACV 04-887- JVS (RZx)
Dated and Filed: January 28, 2005

Title: Charles H. Bond v. Franchise Tax Board. et al.

PRESENT: HONORABLE JAMES V. SELNA, UNITED STATES DISTRICT JUDGE

Karla J. Tunis	Maria Dellaneve
Courtroom Deputy	Court Reporte

ATTORNEYS PRESENT FOR PLAINTIFFS:
Charles H. Bond, ipp

ATTORNEYS PRESENT FOR DEFENDANTS:
S. Paul Bruguera

PROCEEDINGS: Defendants' Motion to Dismiss (Fld 11-24-04)

Cause called and the parties state their appearances. The Court's tentative ruling is issued. The parties make their arguments. The Court grants the defendants' motion to dismiss and rules in accordance with the tentative ruling as follows:

> Defendants Franchise Tax Board ("FTB"), Executive Director Gerald B. Goldberg ("Goldberg") and Leslie R. (collectively, "Defendants") move this Court for an order dismissing this action. The motion is brought pursuant to Federal Rule of Civil Procedure ("Rule") 12(b)(1) because the Court lacks jurisdiction, Rule 12(b)(6) because the complaint fails to state a claim upon which relief can be granted, and Rule 8(a)(2) because the complaint does not provide a clear, concise statement of the case. The motion is granted.

Background

This action arises out of practices, acts and/or policies of Defendants, which, according to plaintiff Charles H. Bond ("Bond"), have resulted in wrongful accusations that he filed "frivolous and invalid" income tax returns in 2000, 2001, 2002 and 2003. For each year, the FTB and Leslie R. concluded that Bond's income tax. returns: (1) Did "no information upon which the substantial correctness of the tax may be judged, or contain[ed] information that on its face indicates that the tax self-assessment is substantially incorrect"; and (2) Were "due to a position that is frivolous, or a desire to impede or

delay the administration of income tax laws." (Complaint, ¶¶ 5-7.) Each year, Bond allegedly responded to the FTB's and Leslie R.'s findings by showing that the returns were valid. (Id., ¶¶ 8-10.) Bond also claims that he requested an "Administrative Review" and/or a "Due Process" hearing for all the challenged returns. (Id., ¶11.) According to Bond, the FTB scheduled a hearing before a FTB hearing officer, but no such hearing was ever afforded. (Id., ¶¶ 12.)

On July 28, 2004, Bond filed this action for injunctive relief under 42 U.S.C. §§ 1983 and 1985, declaratory relief pursuant to 28 U.S.C. §§ 2201 and 2202, compensatory and punitive damages and costs of suit. In his complaint, Bond claims that Defendants, whom he has sued both in their official and individual capacities, have violated his due process rights and his right to free speech.

Discussion

Defendants seek dismissal of this action pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction, under Rule 12(b)(6) because the complaint fails to state a claim upon which relief can be granted, and pursuant to Rule 8(a)(2) because the complaint does not present a clear, concise statement of the case.

1. Dismissal for Lack of Subject Matter Jurisdiction, Rule 12(b)(1)

When a court lacks jurisdiction over the subject matter of a claim, dismissal is proper under Rule 12(b)(1). Fed. R Civ. P. 12(b)(1). In ruling on a 12(b)(1) motion, the court may consider evidence related to the juris-

dictional issue and resolve factual disputes as necessary, if the jurisdictional question is capable of being separated from the merits of the case.

Thornhill Pub. Co. v. General Tel. and Electronics Corp., 594 F.2d 730, 733 (9th Cir. 1979).

As such, "no presumption of truthfulness attaches to plaintiffs allegations" in this context. Id. (quoting Mortensen v. First Fed. Savings & Loan Ass'n, 549 F.2d 884, 891 (3d Cir. 1977)).

Defendants offer three arguments why this action should be dismissed for lack of subject matter jurisdiction: (A) the state and its officers and employees are not "persons" under 42 U.S.C. § 1983 ("§ 1983"); (B) sovereign immunity and the Eleventh Amendment bar this action; and (C) the Tax Injunction Act, 28 U.S.C. § 1341 ("§ 1341"), bars injunctive relief.

The Court agrees with Defendants that neither a state nor its governmental subdivisions are "persons" for purposes of claims under § 1983. Sable Com of Cal. v. Pacific Tel., 890 F.2d 184, 191 (9th Cir. 1989). Because the FTB is a subdivision of the government of California, the Court dismisses Bond's § 1983 claim against the FTB. Fed. R. Civ. P. 12(b)(1).

The U.S. Supreme Court has also extended this rule to state officials, finding that state officials acting in their official capacities are not "persons" under section 1983. Hafer v. Melo, 502 U.S. 21, 26 (1991). An exception to this rule exists, however, when state officials have been sued in their official capacities for injunctive relief under § 1983. See Will v. Mich. Dep't of State Police,

491 U.S. 58, 71 n.10 (1989) ("Of course a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because 'official-capacity actions for prospective relief are not treated as actions against the State.'") Therefore, insofar as Bond seeks injunctive relief under § 1983 against Goldberg and Leslie R. in their official capacities, they must be deemed "persons" for purposes of the § 1983 claim. The Court cannot grant Defendants' motion to dismiss the § 1983 claim for injunctive relief against Goldberg and Leslie R. on this ground.

Also, this Court cannot grant Defendants' motion to dismiss Bond's § 1983 claim against Goldberg and Leslie R. in their individual capacities because "officers sued in their personal capacity come to court as individuals. . . [and] fit[] comfortably within the statutory term 'person.'" Hafer, 502 U.S. at 27. The Court, however, does grant Defendants' motion to dismiss the § 1983 claim against Goldberg and Leslie R. in their official capacities to the extent that Bond seeks compensatory and punitive damages against them. Fed. R. Civ. P. 12(b)(1).

Next, Defendants contend that the entire action against the FTB is barred by sovereign immunity and the Eleventh Amendment to the U.S. Constitution ("Eleventh Amendment"). The Eleventh Amendment prohibits suits against states in federal courts. U.S. Const., 11th Amendment. This immunity applies, not only to the state, but also to state agencies, like the FTB. Edelman v. Jordan, 415 U.S. 651, 663 (1974). Accordingly, Defendants argue this suit cannot be brought against the FTB.

Bond, however, asserts that the FTB has waived its sovereign immunity by appearing in this Court to contest the

service of his complaint. In support of his argument of waiver, Bond cites Lapides v. Board of Regents of the University System of Georgia, 535 U.S. 613 (2002), which states that "a State's voluntary appearance in federal court amounts to a waiver of its Eleventh Amendment immunity." Id. at 619.

The Court finds that he Bond has misinterpreted this case. In Lapides, the Court addressed the question of whether a state waived it Eleventh Amendment immunity by affirmative litigation conduct, removal of a case from state to federal court. Id. at 617. The Supreme Court held that, because the state had voluntarily invoked the jurisdiction of the federal court, the state had waived its Eleventh Amendment immunity. Id. at 624. The Court, however, limited its holding to the context of removal, a clear voluntary invocation of the federal court system, so as to avoid accidental waivers. Id. at 623-24.

Because the FTB did not voluntarily invoke the jurisdiction of this Court by removing this case from state court, the Court finds that the FTB has not waived its Eleventh Amendment immunity. Accordingly, the Court grants Defendants' motion to dismiss this action against the FTB. Fed. R. Civ. P. 12(b)(1).

Defendants also seek to dismiss this suit on Eleventh Amendment grounds against Goldberg and Leslie R. in their official capacities. The Supreme Court has held that Eleventh Amendment immunity shields state officials when they are sued in their official capacities and the state is the real party in interest. Edelman, 415 U.S. at 663, 666-67. An exception to such immunity, however, has been recognized for state officers sued in their official capacities for prospective injunctive or declaratory

relief. Ex Parte Young, 209 U.S. 123 (1908). See also Frew ex. rel. Frew v. Hawkins, 540 U.S. 431, 437 (2004) (same); ACS of Fairbanks, Inc. v. Gel Communication Corp., 321 F.3d 1215, 1217 (9th Cir. 2003) (same).

To apply the principle of Ex Parte Young, "a court need only conduct a straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." Verizon Md. Inc. v. Pub. Serv. Comm'n of Md., 535 U.S. 635, 645 (2002) (internal quotations omitted).

The Court finds that Bond's claims for injunctive and declaratory relief satisfy both elements of this inquiry. Bond is challenging the constitutionality of the FTB's policy of not affording "due process hearings," which would allow him to dispute the FTB's findings concerning his tax returns before he must file a personal income tax return. Because the FTB has not instituted such a hearing, the alleged violation of Bond's due process rights continues to occur and any relief, both declaratory and injunctive, would necessarily be prospective.

Bond also alleges that his free speech rights have been violated by the FTB's determination that the statement "all rights reserved" on the returns vitiated the jurat and rendered them frivolous and invalid. The FTB has not changed its position regarding the vitiated jurat, therefore, the alleged violation of Bond's free speech rights continues. Injunctive and declaratory relief on this claim would be prospective because it would require future action on the part of Defendants.

Based on the foregoing, the Court finds that Bond's claims for injunctive and declaratory relief against Goldberg and Leslie R. in their official capacities fall within the Ex Parte Young exception to the Eleventh Amendment. Accordingly, the Court cannot grant Defendants' motion to dismiss these claims against Goldberg and Leslie R. in their official capacities on this ground. Nor can the Court grant Defendants' motion to dismiss the action against Goldberg and Leslie R. in their individual capacities because the Eleventh Amendment does not apply to officers sued personally.

As noted above, the Eleventh Amendment, however, does shield Goldberg and Leslie R. insofar as Bond seeks damages against them in their official capacities. Accordingly, this Court grants Defendants' motion to dismiss Bond's complaints for damages against Goldberg and Leslie R., as sued in their official capacities. Fed. R. Civ. P. 12(b)(1).

Defendants also contend that the injunctive relief Bond seeks is barred by the Tax Injunction Act, § 1341. Section 1341 provides that "district courts shall not enjoin. . . the assessment, levy or collection of any tax under state law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. § 1341. The statute bars both declaratory and injunctive relief in state tax disputes "as long as the taxpayer has an adequate remedy in state court." Patel v. City of San Bernardino, 310 F.3d 1138, 1140 (9th Cir. 2002).

The state court remedy may be deemed adequate if it "meets certain minimal procedural criteria." Rosewell v. LaSalle Nan Bank, 450 U.S. 503, 512 (1981) (emphasis in original). Specifically, "the state must pro-

vide the taxpayer a full hearing at which constitutional challenges to the tax may be raised." Air Polynesia. Inc. v. Freitas, 742 F.2d 546, 547 (9th Cir. 1984). The State, however, may satisfy these requirements with either a predeprivation or a postdeprivarion process. Nat' Private Truck Council v. Okla. Tax Comm'n, 515 U.S. 582, 587 (1995).

To determine whether § 1341 bars Bond's injunctive and declaratory relief claims, the Court must first determine whether it even applies to this action. Because the Ninth Circuit has not applied § 1341 to situations, like this case, involving claimed violations of personal rights, such as procedural due process, rather than merely the collection of taxes, the Court must look to other sources of guidance on this issue. At least two other circuits have addressed situations similar to that presented here. The Court finds these cases instructive.

In McQueen v. Bullock, 907 F.2d 1544 (5th Cir. 1990), a taxpayer sought relief on the basis that the Texas tax scheme contravened federal due process because it failed to provide "a prompt post-deprivation hearing that establishes the probable validity of assessments." Id. at 1546. The Fifth Circuit applied § 1341 to preclude the federal court from exercising jurisdiction over the taxpayer's due process claim. Id. at 1551. The court based its ruling on the fact that McQueen had a "plain, speedy and efficient remedy because Texas courts would permit him to assert his federal claims." Id. at 1547.

Similarly, the Seventh Circuit applied § 1341 to a suit challenging state tax procedures on due process grounds. Huber Pontiac. Inc. v. Whitler, 585 F.2d 817, (7th Cir. 1978). The Court held that it "finds no support

for [the] contention that administrative procedures of state taxing agents were meant to be excluded from the Section 1341 bar." Huber, 585 F.2d at 820. In addition, the Seventh Circuit found that a request seeking a new hearing from the state tax agency fell squarely within the language of § 1341 because such an action "'suspend[s]' the State's ability to collect the deficiency tax from [the taxpayer] until a later day." Id.

Bond argues that § 1341 is inapplicable to this case under Hibbs v. Winn, 124 S.Ct. 2276 (2004), because he seeks only prospective relief. The Court disagrees. In Hibbs, the Supreme Court found that § 1341 did not bar a federal court from hearing a taxpayer action to prevent the operation of a statute that provided income-tax credits for school tuition payments. Id. The Supreme Court, however, did not, as Bond claims, rest its ruling on the fact that the taxpayers sought prospective relief. Rather, the Supreme Court found that § 1341 did not preclude federal courts from hearing cases in which a taxpayer challenged the constitutionality of tax *benefits*. Id. According to the Supreme Court, § 1341 does not completely bar federal courts from hearing all state tax cases. Id. Section 1341 only precludes federal courts from hearing cases in which a taxpayer seeks to avoid paying taxes by challenging a tax statute intended to produce revenue. Id. Hibbs, therefore, is inapposite to Bond's situation because he does not challenge tax benefits, but, rather, seeks to avoid filing a personal income tax return under California Revenue and Taxation Code § 18501 ("§ 18501").

Based on the foregoing, this Court finds that § 1341 encompasses Bond's claims.

Next, in order to determine whether § 1341 bars this action, the Court must decide whether a "plain, speedy and efficient" state remedy exists. 28 U.S.C. § 1341. The Court finds that such remedies exist in California. First, as Defendants point out, Bond may pursue administrative remedies, i.e. seek a refund, after he files a personal tax return as required by § 18501 and pays the tax assessed by the FTB. Cal. Rev. & Tax. Code §§ 19301, et seq. Should the FTB deny his claim, he can file an appeal with the State Board of Equalization. Id. If Bond disagrees with the Board of Equalization's determination, he can also bring a lawsuit against the FTB in California superior court to recover the whole or any part of the amount paid on the basis that the tax computed and assessed is void in whole or in part. Cal. Rev. & Tax. Code § 19382. Although this could be deemed a "postdeprivation" process, this still satisfies the requirements of Nat'l Private Truck. 515 U.S. at 587. Bond could also simply bring his § 1983 challenges to the FTB's procedures in the state court. 42 U.S.C. § 1983. See also Genesis Envtl. Servs. v. San Joaquin Valley Air Pollution Control Dist., 113 Cal.App.4th 597, 604 (2003) (noting that state courts have jurisdiction to hear cases under § 1983).

Because the Court finds that § 1341 applies to this action and that plain, speedy and efficient state remedies exist, Bond's claims for injunctive and declaratory relief cannot be heard in this Court.

In addition, although not raised by Defendants, the Court finds that Bond's claims for damages are barred under a similar doctrine, principles of comity. Fair Assessment of Real Estate Ass'n v. McNary, 454 U.S. 100,

116 (1981). See also Nat'l Private Truck Council, 515 U.S. at 586 ("We have long recognized that principles of federalism and comity generally counsel that courts should adopt a hands-off approach with respect to state tax administration."). Under principles of comity, taxpayers may not assert § 1983 actions against the validity of state taxation systems in federal courts. McNary, 515 U.S. at 116. Rather, taxpayers must seek protection of their constitutional rights through state remedies, as long as those remedies are "plain, adequate and complete." Id.

Based on the foregoing, Defendants' motion to dismiss is granted on the grounds that § 1341 and principles of comity deprive this court of subject matter jurisdiction over all claims in this action. Fed. R. Civ. P. 12(b)(1).

2. Dismissal for Failure to State a Claim Upon which Relief May be Granted, Rule 12(b)(6)

In light of the above ruling, the balance of Defendants' motion to dismiss is moot. For the sake of completeness, however, the Court briefly addresses the remaining arguments.

Defendants also base their motion to dismiss on Rule 12(b)(6). Dismissal of an action pursuant to this rule is proper where the plaintiff fails to state a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(6). Such a dismissal may be based either on the "lack of a cognizable legal theory" or the "absence of sufficient facts alleged under a cognizable legal theory." Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1988). In reviewing a motion to dismiss, an of the plaintiff's allegations of material fact must be taken as true

and construed in the light most favorable to the nonmoving party. Everest & Jennings v. American Motorists Ins. Co., 23 F.3d 226, 228 (9th Cir. 1994).

Defendants argue that this case is not ripe for review because Bond has not exhausted his administrative remedies. The Ninth Circuit has found that an action that falls under § 1341 is not ripe. Shell Petroleum v. Graves, 709 F.2d 593, 597 (9th Cir. 1983). Because § 1341 applies to this action, the Court finds that this action is not ripe for federal judicial review.

Defendants also contend that Goldberg and Leslie R. should receive absolute, or in the alternative, qualified immunity for their actions. Because it appears that no federal court has yet addressed the specific question of whether state tax officials are entitled to absolute immunity and because this question has been rendered moot in this case, the Court declines to render an opinion on this issue.

The Court, however, does find that Goldberg and Leslie R. are entitled to qualified immunity insofar as they are sued in their individual capacities. The Court finds that Goldberg and Leslie R. were performing discretionary functions that they could have reasonably considered consistent with rights Bond alleges were violated. Anderson v. Creighton, 483 U.S. 635, 638 (1987). Equally dispositive is the fact that no binding precedent from the U.S. Supreme Court, the Ninth Circuit, or the highest state court prohibited their conduct at the time they took the actions from which this case arose. Baker v. Racansky, 887 F.2d 183, 187 (9th Cir. 1989); Robinson v. Bibb, 840 F.2d 349, 351 (6th Cir. 1988). Moreover, it appears that their conduct was not objectively

unreasonable. Anderson, 483 U.S. at 643-45. Accordingly, Goldberg and Leslie R., as sued in their individual capacities, are entitled to qualified immunity in this suit.

3. Dismissal for Failure to Make a Short, Plain Statement of the Claim, Rule 8(a)(2)

The Court deems Defendants' argument that Bond's complaint does not contain a short and plain statement of his claim to be without merit. The Court finds that Bond's complaint is not confusing, misleading or argumentative and, therefore, complies with Rule 8.

EXHIBIT "B"
COURT REPORTER'S TRANSCRIPT
BEFORE THE DISTRICT COURT.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION
THE HON. JAMES V. SELNA, JUDGE PRESIDING

CHARLES H. BOND, PLAINTIFF, VS. FRANCHISE TAX BOARD, ET AL, DEFENDANT,	NO. SA CV 04-887-JVS

REPORTER'S TRANSCRIPT OF PROCEEDINGS
DEFT'S MOTION TO DISMISS
SANTA ANA, CALIFORNIA

FRIDAY, JANUARY 28, 2005

MARIA DELLANEVE, CSR 9132
UNITED STATES COURTHOUSE
RONALD REAGAN FEDERAL BUILDING
411 WEST FOURTH STREET
SANTA ANA, CALIFORNIA 92701
(714) 564-9259

APPEARANCES OF COUNSEL:

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STATE OF CALIFORNIA, DEPT. OF JUSTICE
BY: S. PAUL BRUGUERA, DAG, ESQ.
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LOS ANGELES, CALIFORNIA 90013
(213) 576-7156

SANTA ANA, CALIFORNIA, ON FRIDAY, JANUARY 28, 2005

-000-

THE CLERK: ITEM SIX, SANTA ANA CIVIL, 04-887-JVS. CHARLES H. BOND VERSUS FRANCHISE TAX BOARD, ET AL.

COUNSEL, PLEASE STATE YOUR APPEARANCES – COUNSEL AND PARTIES.

MR. BRUGUERA: GOOD AFTERNOON, YOUR HONOR. DEPUTY ATTORNEY GENERAL S. PAUL BRUGUERA FOR DEFENDANT AND MOVING PARTIES.

THE COURT: GOOD AFTERNOON.

MR. BOND: CHARLES BOND, PRO SE.

THE COURT: GOOD AFTERNOON, SIR.

MR. BOND: THANK YOU, SIR.

THE COURT: MR. BRUGUERA, IT'S YOUR MOTION.

MR. BRUGUERA: YES, YOUR HONOR. WE HAVE SEEN THE TENTATIVE RULING. WE'LL SUBMIT ON THE TENTATIVE.

THE COURT: CAN YOU TELL ME WHY YOU DIDN'T FILEYOUR REPLY BRIEF UNTIL YESTERDAY?

MR. BRUGUERA: I APOLOGIZE, YOUR HONOR. I'M SWITCHING SECTIONS. I MISFILED, GOT LOST IN THE SHUFFLE. I'VE GOT SOME NEW FILES THAT I HAVE BEEN PREOCCUPIED WITH.

THE COURT: MR. BOND, WOULD YOU LIKE TO BE HEARD?

MR. BOND: I'M SORRY?

THE COURT: WOULD YOU LIKE TO BE HEARD? WOULD YOU I LIKE TO PRESENT YOUR POSITION ON THIS?

MR. BOND: YES, SIR, I WOULD.

THE COURT: PLEASE. COME FORWARD

MR. BOND: YOUR HONOR, I'D LIKE TO OBJECT TO THE DEPUTY DISTRICT ATTORNEY'S GENERAL INTRODUCTION, ARGUMENTS CONCERNING THE FACTS THAT ARE INCORRECT AND MISLEADING IN HIS MOTION TO DISMISS. SPECIFICALLY, ON PAGE 2 OF THE MOTION TO DISMISS UNDER THE INTRODUCTION PARAGRAPH, COUNSEL FOR THE DEFENDANT STATES THAT, "PLAINTIFF IS A STATE TAXPAYER WHO FILED STATE TAX RETURNS FOR 2000, 2001, 2002, 2003 USING A TAXPAYER IDENTIFICATION NUMBER FOR HIS TRUST INSTEAD OF A SOCIAL SECURITY NUMBER," AND THAT THE TAX RETURNS IN QUESTION WERE BASED ON ERRONEOUS INFORMATION IS COMPLETELY INCORRECT AND MISLEADING.

FIRST, THE ISSUE OF AN IDENTIFICATION NUMBER VERSUS A SOCIAL SECURITY NUMBER WAS NEVER AN ISSUE.

THE COURT: SIR, LET'S CONCENTRATE ON THE ISSUES THAT THE ATTORNEY GENERAL RAISES AS TO WHY YOUR COMPLAINT IS LEGALLY INSUFFICIENT.

MR. BOND: OKAY. YOUR HONOR, I HAVE REPEATEDLY REQUESTED THE FTB FOR AN ADMINISTRATIVE REVIEW AND FOR A DUE PROCESS HEARING IN ORDER TO CHALLENGE THE RETURNS IN QUESTION. I RESPONDED TO THE FTB'S FINDINGS AND DEMONSTRATED THAT

THE RETURNS IN QUESTION WERE NOT FRIVOLOUS OR INVALID. THE FTB NEVER REBUTTED MY DEFENSES NOR DID THE FTB PROVIDE A PROCESS OR REMEDY IN ORDER TO CHALLENGE THEIR FINDINGS.

THE COURT: DON'T YOU HAVE A REMEDY IN SUPERIOR COURT? DIDN'T YOU GO TO SUPERIOR COURT AND TAKE THEM ON THERE?

MR. BOND: MY REMEDY HERE IS A FEDERAL ISSUE OF MY RIGHTS BEING VIOLATED FOR DUE PROCESS.

THE COURT: BUT ONE OF THE ISSUES IN DETERMINING WHETHER YOU STATE A FEDERAL CLAIM IS WHETHER YOU HAVE A WAY TO REVIEW THE ACTION OF THE FRANCHISE TAX BOARD, EITHER BEFORE THEY TAKE THE ACTION OR AFTER THEY TAKE THE ACTION. AND DON'T YOU HAVE A REMEDY IN THE SUPERIOR COURT TO CHALLENGE THE ACTIONS THEY HAVE TAKEN WITH RESPECT TO YOUR RETURNS?

MR. BOND: WELL, I HAVE REPEATEDLY ASKED FOR -

THE COURT: NO, NO, NO. I UNDERSTAND YOUR POSITION. YOU HAVE ASKED FOR A HEARING IN FRONT OF THE FRANCHISE TAX BOARD. YOUR POSITION IS THEY HAVEN'T GIVEN IT TO YOU, THEY WON'T GIVE IT TO YOU, AND THAT YOU HAVE BEEN DENIED DUE PROC-

ESS. BUT UNDER THE FEDERAL ANALYSIS, THERE ARE REALLY TWO ISSUES HERE. DO YOU HAVE AN ADMINISTRATIVE PROCEDURE IN FRONT OF THE FRANCHISE TAX BOARD OR DO YOU HAVE A PROCEDURE YOU CAN INVOKE AFTER THEY HAVE ACTED OR FAILED TO ACT; NAMELY, AN ACTION IN THE SUPERIOR COURT UNDER THE REVENUE AND TAXATION CODE? DON'T YOU HAVE THAT REMEDY AVAILABLE?

MR. BOND: NOT THAT I'M AWARE, SIR. THAT'S WHY I BROUGHT THIS ACTION, BECAUSE I COULDN'T GET ANY RESPONSE WHATSOEVER FROM THE FTB OR THE DEFENDANTS. NOTHING. NOT ONE WORD.

THE COURT: HAVE YOU LOOKED INTO WHETHER YOU HAVE A REMEDY IN SUPERIOR COURT TO CHALLENGE THE ACTIONS OR INACTIONS OF THE FRANCHISE TAX BOARD?

MR. BOND: I HAVE GONE THROUGH THE LAW BOOKS, SIR. I CANNOT FIND ANYTHING. THERE IS NO PROCESS I CAN FIND IN THERE WHERE I CAN BE AFFORDED A DUE PROCESS HEARING. THEREFORE, I FEEL THAT THE DEFENDANT'S ACTIONS AND INACTIONS HAVE VIOLATED MY DUE PROCESS RIGHTS AND HAVE VIOLATED MY PROCEDURAL DUE PROCESS. AND COMPARE THAT WITH MATTHEWS V. ELRIDGE, 1976, AT 96 SUPREME COURT 893. MORRISEY V. BREWER, 1972, THAT'S AT 92 SUPREME COURT 2593. AND MULLANE V. CEN-

TRAL HANOVER BANK AND TRUST AT 339 U.S. 306. 1950 CASE.

YOUR HONOR, THE DEFENDANTS ASSERT THAT THIS COURT SHOULD DISMISS THE PENDING COMPLAINT FOR LACK OF SUBJECT MATTER JURISDICTION PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12 (B) (1) . THE DEFENDANT'S ASSERTION IS INCORRECT AS A MATTER OF LAW. DEFENDANTS HAVE FAILED TO SEE THAT MY COMPLAINT WAS BROUGHT UNDER THIS COURT'S ORIGINAL JURISDICTION PURSUANT TO 28 U.S.C. 1331 AND 1343. FURTHER, THIS COURT HAS ACCEPTED AND FILED THE COMPLAINT AS CAUSED, 28 U.S.C. 1331, FEDERAL QUESTION. SEE THE DOCKET SHEET.

SINCE THE DEFENDANTS HAVE FAILED TO DEFEND THEMSELVES AGAINST THIS COURT'S ORIGINAL JURISDICTION PURSUANT TO 28 U.S.C. 1331, 1343, THE DEFENDANTS HAVE WAIVED SUCH A DEFENSE BEFORE THIS COURT AND ON APPEAL. AND COMPARE WITH MARTINEZ V. ELLIS, 1951, F.2D AT 1153, A 9TH CIRCUIT COURT CASE, IN 1993. GRAY V. NETHERLAND, A 1996 CASE, 116 SUPREME COURT, 2074. AND TREST V. CAIN, 1997, 118 SUPREME COURT, 487.

THIS COURT HAS ORIGINAL JURISDICTION TO RESOLVE THE CONTROVERSY AND FEDERAL QUESTION RAISED IN MY COMPLAINT PURSUANT TO 28 U.S.C. 1331, 3043' SEE ALSO ARTICLE III OF THE UNITED STATES CONSTITUTION AND MARBURY V. MADISON, 137, 177, THE

2ND LAWYERS EDITION 60, AN 1803 CASE.

MOREOVER, I HAVE BASED MY FEDERAL CAUSE OF ACTION ON 42 U.S.C. 1983 AND PROVIDED THIS COURT WITH FEDERAL JURISDICTION PURSUANT TO 28 U.S.C. 1331, 1343. SEE THE WINN V. KILLIAN CASE, 307 F.3D AT 1011. IT'S A 9TH CIRCUIT CASE IN THE YEAR 2002.

THE DEFENDANTS HAVE WAIVED THE RIGHT TO ASSERT THE LACK OF JURISDICTION BASED ON INSUFFICIENT SERVICE. IT IS WELL ESTABLISHED THAT FAILURE TO ASSERT IT SEASONABLY BY FORMAL SUBMISSION AND A CAUSE OR BY SUBMISSION THROUGH CONDUCT. AND COMPARE THAT WITH WALKER V. SERGEANT KAISER, NUMBER 98, CIVIL 5217, 2001, WESTLAW 116 0588 AT NUMBER FIVE. A SOUTHERN DISTRICT IN NEW YORK 2001 CASE.

A DEFENSE OF INSUFFICIENCY OF PROCESS IS WAIVED IF IT IS NOT PROPERLY ASSERTED BY MOTION OR IN THE RESPONSIVE PLEADING. FEDERAL RULES OF CIVIL PROCEDURE 12(H) (1) AND COMPARE THAT WITH SANTOS V. STATE FARM CASUALTY COMPANY, 902 F.2D 1092, 1095. IT'S A SECOND CIRCUIT CASE, 1990. AND AHERN V. NEVRY, 285, F.SUPP 2D AT 317, EASTERN DISTRICT NEW YORK, 2003 CASE.

DEFENDANT'S ASSERTION THAT NEITHER THE STATE NOR ITS OFFICIALS ACTING IN THEIR OFFICIAL CAPACITIES ARE PERSONS WITHIN THE MEANING OF 1983 IS COMPLETELY

FLAWED AND INCORRECT. FIRST, I HAVE NOT NAMED THE STATE OF CALIFORNIA A DEFENDANT OR SUBJECT.

THE COURT: SIR, THE LAW IS VERY CLEAR THAT A STATE ENTITY IS THE STATE FOR THE PURPOSE OF THAT DOCTRINE THAT THE STATE IS NOT A PERSON FOR PURPOSES OF SECTION 1983. SO EVEN THOUGH YOU HAVEN'T NAMED THE STATE, PER SE, ALL OF ITS AGENCIES GET THE BENEFIT OF THAT CASE LAW AS DO OFFICIALS ACTING WITHIN THEIR OFFICIAL CAPACITY.

MR. BOND: WELL, THE CASE CITED BY A DEFENDANT, HAYFORD V. MILO, 502 U.S. 21, 1991, IS CONTRARY TO THE DEFENDANT'S POSITION AND COMPLETELY OPPOSITE OF WHAT THE DEFENDANT'S TRYING TO CONVEY TO THE COURT. IN HAYFORD V. MILO, SUPRA, THE SUPREME COURT, SPEAKING THROUGH JUSTICE O'CONNOR, EXPLICITLY HELD, STATE OFFICERS MAY BE HELD PERSONALLY LIABLE FOR DAMAGES UNDER 1983 BASED UPON ACTIONS TAKEN IN THEIR OFFICIAL CAPACITIES.

THE HAYFORD COURT FURTHER STATED, STATEMENT IN PRIOR DECISION THAT OFFICIALS ACTING IN THEIR OFFICIAL CAPACITY ARE NOT PERSONS UNDER SECTION 1983 WAS BEST UNDERSTOOD, AS REFERENCED TO CAPACITY IN WHICH STATE OFFICER WAS BEING SUED, NOT CAPACITY IN WHICH OFFICER INFLICTED ALLEGED INJURY. STATEMENT DID

NOT MAKE SECTION 1983 RELIEF UNAVAILABLE AGAINST STATE OFFICERS SUED IN THEIR INDIVIDUAL CAPACITIES FOR DAMAGES ARISING FROM OFFICIAL ACTS.

THE COURT: DON'T I SAY THAT IN THE TENTATIVE?

MR. BOND: I BELIEVE IT'S WORDED SOMEWHAT LIKE THAT. I HAD TO READ THROUGH IT REAL FAST.

GOVERNMENT OFFICIALS IN ROLE OF PERSONAL CAPACITY DEFENDANT IS PERSON SUBJECT TO SUIT FOR DAMAGES UNDER 1983 FOR ACTIONS TAKEN IN THEIR OFFICIAL CAPACITY.

THE COURT: SIR, TO THE EXTENT YOU ARE SUING THE INDIVIDUALS IN THEIR INDIVIDUAL CAPACITY, I AGREE WITH YOU. SO YOU DON'T NEED TO PRESS THAT POINT. I AGREE WITH YOU ON THAT ARGUMENT. I THINK THERE ARE OTHER ARGUMENTS THAT THE STATE RAISES THAT ARE DISPOSITIVE OF THE CLAIMS AGAINST THE INDIVIDUALS. BUT ON THAT GROUND I AGREE WITH YOU.

MR. BOND: OKAY. THANK YOU.

I HAVE SUED THE DEFENDANTS TAX BOARD, GERALD GOLDBERG AND LESLIE R. IN THEIR OFFICIAL AND INDIVIDUAL CAPACITIES. AND

THE DEFENDANTS ARE PERSONS AND SUBJECT TO SUIT FOR DAMAGES UNDER 1983 FOR ACTIONS TAKEN IN THEIR OFFICIAL CAPACITY. AND THAT AGAIN IS HAYFORD V. MILO, 502 U.S. 21.

IN THE WINN CASE, IN A SIMILAR CASE SUCH AS THIS CASE, KATHLEEN WINN AND SEVERAL TAXPAYERS IN THE STATE OF ARIZONA BROUGHT SUIT AGAINST MARK W. KILLIAN, THE DIRECTOR OF THE ARIZONA DEPARTMENT OF REVENUE IN FEDERAL COURT. MS. WINN AND THE TAXPAYERS BASE THEIR FEDERAL CAUSE OF ACTION ON 42 U.S.C. 1983 AND FEDERAL JURISDICTION UNDER 28 U.S.C. 1331. OF COURSE, THE ARIZONA DEPARTMENT OF REVENUE IS EQUIVALENT TO THE FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA AND MARK W. KILLIAN, THE DIRECTOR OF THE ARIZONA DEPARTMENT OF REVENUE IS EQUIVALENT TO GERALD H. GOLDBERG, THE DIRECTOR OF THE FRANCHISE TAX BOARD.

IF ARIZONA DEPARTMENT OF REVENUE AND DIRECTOR MARK V. KILLIAN WERE NOT PERSONS SUBJECT TO FEDERAL SUIT, MS. WINN AND THE ARIZONA TAXPAYERS WOULD HAVE LOST THEIR FEDERAL SUIT. MS. WINN AND THE ARIZONA TAXPAYERS DID NOT LOSE THEIR FEDERAL SUIT. THEY PREVAILED IN THE FEDERAL SUIT IN THE 9TH CIRCUIT COURT OF APPEALS AND IN THE UNITED STATES SUPREME COURT OF THE UNITED STATES. SEE WINN V. KILLIAN, 307 F.3D, 1011 9TH CIRCUIT CASE 2002

AND HIBBS V. WINN. THAT'S AT 124 SUPREME COURT, 2276, DECIDED JUNE 4 OF 2004.

THE PRESENT CASE IS IDENTICAL. THE DEFENDANTS NOT PERSONS DEFENSE IS WITHOUT MERIT. MOREOVER, DEFENDANTS ARE NOT STRANGERS TO LAWSUITS. COMPARE WITH CONTAINER CORP. OF AMERICA V. FRANCHISE TAX BOARD 1993, 103 SUPREME COURT, 2933. BARCLAYS BANK PLC V. FRANCHISE TAX BOARD, 512 U.S. 298, 1994. AND FRANCHISE TAX BOARD OF CALIFORNIA V. HYATT NUMBER 02-42, APRIL 23, 2003. THEREFORE, THE DEFENDANT'S ASSERTION THAT THE DEFENDANTS ARE NOT PERSONS UNDER 42 U.S.C. 1983 IS COMPLETELY FLAWED AND WHOLLY WITHOUT MERIT.

THE DEFENDANT'S ASSERTION THAT MY FEDERAL COMPLAINT IS BARRED BY SOVEREIGN IMMUNITY AND BY THE 11TH AMENDMENT OF THE UNITED STATES CONSTITUTION IS FLAWED AND INCORRECT. TO APPRECIATE MY SENTIMENT AND COMMENT, I ADVANCE SEVERAL REASONS WHY THE SOVEREIGN IMMUNITY 11TH AMENDMENT DEFENSE DOES NOT SHIELD DEFENDANTS FROM THE FEDERAL SUIT.

FIRST, AS MENTIONED ANTE AND SHOWN BY THE LIBERAL READING OF THE COMPLAINT, I DID NOT ALLEGE OR NAME THE STATE OF CALIFORNIA AS A DEFENDANT IN THE FEDERAL SUIT.

THE COURT: BUT, SIR, WE HAVE GONE OVER THIS POINT.

MR. BOND: WELL, SIR –

THE COURT: FOR THIS PURPOSE, THE STATE'S ENTITIES HAVE THE SAME ENTITLEMENT TO SOVEREIGN IMMUNITY AND THE 11TH AMENDMENT AS THE STATE ITSELF, AS DO PEOPLE IN THEIR OFFICIAL CAPACITIES.

MR. BOND: WELL, SIR, NOVEMBER 29, 2004, WHEN DEPUTY ATTORNEY GENERAL OF CALIFORNIA, S. PAUL BRUGUERA, APPEARED BEFORE THIS COURT FOR THE CONFERENCE HEARING ON BEHALF OF THE STATE OF CALIFORNIA, THE DEFENDANTS FRANCHISE TAX BOARD, GERALD GOLDBERG, AND LESLIE R. IN HIS APPEARANCE, THE DEPUTY GENERAL ACCEPTED THE SERVICE OF THE FEDERAL COMPLAINT ON BEHALF OF THE STATE OF CALIFORNIA AND THE NAMED DEFENDANTS.

THIS APPEARANCE AMOUNTED TO A WAIVER OF THE STATE'S AND THE NAMED DEFENDANT'S 11TH AMENDMENT IMMUNITY. YOUR HONOR, IN LAPIDES V. BOARD OF REGENTS OF UNIVERSITY SYSTEM, 535 U.S. 613 IN 2002, THE SUPREME COURT ELOQUENTLY STATED –

THE COURT: BUT AREN'T THE FACTS DIFFERENT IN LAPIDES? ISN'T THAT CASE LIMITED TO THE PROPOSITION THAT IF THE STATE RE-

MOVES TO FEDERAL COURT -- THAT IS, THE STATE INVOKES THE JURISDICTION OF THIS COURT BY REMOVING TO FEDERAL COURT, THE STATE HAS WAIVED ITS 11TH AMENDMENT RIGHT. AND ISN'T LAPIDES EXPRESSLY LIMITED TO THAT PROPOSITION? AND ISN'T IT THE CASE HERE THAT YOU INVOKED THE JURISDICTION OF THE COURT? THE STATE DIDN'T INVOKE THE JURISDICTION OF THE COURT.

MR. BOND: SO THE RULING WAS NOT DECIDED BECAUSE THEY MOVED IT FROM STATE TO FEDERAL. THE RULING THAT WAS I HELD SAYS NOTHING ABOUT THAT. IT SAYS THE APPEARANCE IS WHAT WAIVED THE IMMUNITY.

THE COURT: BUT IF YOU GO TO -

MR. BOND: NOT BECAUSE IT WAS -

THE COURT: IF YOU GO TO PAGE 623, 624 OF THE OPINION, IT'S LIMITED TO THAT. SO THE STATE KNOWS WHAT ACTIONS -- THE STATE HAS A BRIGHT LINE. THE STATE KNOWS IF IT REMOVES, IT'S IN FEDERAL COURT.

MR. BOND: WELL, SIR, I KNOW THAT STATES HAVE 11TH AMENDMENT IMMUNITY UNDER CONDITIONS. BUT WHEN HE MADE HIS APPEARANCE, THEY WAIVED THAT. AND I THINK -- TO BEG YOUR INDULGENCE -- I BELIEVE LAPIDES IS PRETTY CLEAR IN WHAT WAS HELD IN THAT CASE. IT'S WHAT WAS HELD, NOT WHAT -- NOT THE REASON IT WAS MOVED

UP AND THEN THEY WAIVED THE IMMUNITY. IT WAS WHAT WAS HELD. AND WHAT WAS HELD SAYS NOTHING ABOUT THE FACT THAT IT WAS MOVED FROM STATE TO FEDERAL, THEREFORE THEY WAIVED IT. THAT'S NOT IN THE DECISION THAT WAS HELD.

THE COURT: I BEG TO DIFFER WITH YOU, SIR.

MR. BOND: OKAY.

THE COURT: I HAVE READ THE OPINION.

MR. BOND: SO HAVE I.

THE COURT: IT'S NOT AS SWEEPING AS YOU WOULD SUGGEST. IN FACT, THE SUPREME COURT GOES OUT OF ITS WAY TO LIMIT THE ACTIONS THAT A STATE CAN TAKE AND WAIVE ITS SOVEREIGN IMMUNITY.

MR. BOND: WELL, SIR, JUSTICE BREYER FOR THE LAPIDES COURT ELABORATED IN HIS OPINION, MORE THAN A CENTURY AGO THIS COURT INDICATED THAT A STATE'S VOLUNTARY APPEARANCE IN FEDERAL COURT AMOUNTED TO A WAIVER OF ITS 11TH AMENDMENT IMMUNITY CITING CLARK V. BARNARD, 108 U.S. 436, 447, 2ND SUPREME COURT, 878, 27 LAWYERS EDITION 780, 1883 CASE. THAT'S AN 1883 CASE. THAT'S FOR OVER A CENTURY THAT THEY HAVE HELD THAT THEIR VOLUNTARY APPEARANCE IN FEDERAL COURT AMOUNTS TO A WAIVER.

THE COURT: SIR, I THINK YOU NEED TO MOVE ON TO ANOTHER ARGUMENT.

MR. BOND: OKAY. THE SECOND HERE, THE 11TH AMENDMENT PERMITS SUIT'S PROSPECTIVE INJUNCTIVE RELIEF AGAINST STATE OFFICIALS ACTING IN VIOLATION OF FEDERAL LAW. EX PARTE YOUNG 209, U.S. 123. IT'S A 1908 CASE. I AM SEEKING PROSPECTIVE RELIEF -- THAT IS, AFFORDING ME A DUE PROCESS HEARING IN ORDER TO CHALLENGE THE FTB'S FINDINGS AND CONCLUSIONS OF LAW MADE ON THE RETURNS IN QUESTION. THE DEFENDANTS ARE VIOLATING FEDERAL LAW, DUE PROCESS OF LAW BY NOT PROVIDING ME WITH ANY KIND OF PROCESS OR REMEDY.

THE COURT: WELL, SIR, I AGREE WITH YOU ON THAT POINT. TO THE EXTENT YOU ARE ASKING FOR PROSPECTIVE RELIEF, THE 11TH AMENDMENT DOESN'T BAR YOU. SO IF YOU NOTED THAT IN THE TENTATIVE, I AGREED WITH YOU ON THAT POINT.

MR. BOND: OKAY. IN THE FREW V. HAWKINS, 124 SUPREME COURT, 899, A 2003 CASE -- FAIRLY RECENT – THE SUPREME COURT STATED THE 11TH AMENDMENT CONFIRMS THE SOVEREIGN STATUS OF STATES BY SHIELDING THEM FROM SUITS BY INDIVIDUALS ABSENT THEIR CONSENT. THAT WAS A SEMINOLE INDIAN TRIBE OF FLORIDA V. FLORIDA, 517 U.S. 44, 1996 CASE. HOWEVER, YOUR HONOR, TO ENSURE THE ENFORCEMENT OF FEDERAL LAW,

THE 11TH AMENDMENT PERMITS SUITS FOR PROSPECTIVE INCLUDING RELIGIOUS SCHOOLS, WHICH DOES NOT EFFECT REVENUE COLLECTION?

MR. BOND: THAT IS CORRECT, SIR. I'M NOT EFFECTING REVENUE COLLECTION EITHER –

THE COURT: WELL –

MR. BOND: -- IN THIS CASE.

THE COURT: BUT THE CIRCUIT COURT CASES THAT HAVE DEALT WITH THIS ISSUE LUMP A TAX ON PROCEDURES WITH SUBSTANTIVE ATTACKS ON NOT PAYING TAXES. AND YOU'RE I BASICALLY ATTACKING THE FRANCHISE TAX BOARD'S PROCEDURES OR LACK OF PROCEDURES.

MR. BOND: YES, SIR. THE LACK OF DUE PROCESS. HERE, I'M NOT CHALLENGING ANY OF THE TYPES OF PROCEDURE SPECIFIED IN THE TAX INJUNCTION ACT, THE ASSESSMENT LEVY OR COLLECTION OF A TAX REVENUE. BUT I'M SEEKING TO BE AFFORDED A DUE PROCESS HEARING IN ORDER TO CHALLENGE THE DEFENDANT'S FINDINGS AND CONCLUSIONS OF LAW CONCERNING THE TAX RETURNS FOR THE YEARS 2000, 2001, '02 AND '03.

I'M SEEKING PROSPECTIVE RELIEF SEEKING TO BE AFFORDED A DUE PROCESS HEARING

IN ORDER TO CHALLENGE THE FTB'S FINDINGS AND CONCLUSIONS OF LAW MADE ON THE RETURNS IN QUESTION.

THE COURT: BUT ISN'T IT CASE THAT THE FRANCHISE TAX BOARD IS NOT REQUIRED TO GIVE YOU A DUE PROCESS HEARING SO LONG AS AT SOME POINT IN THE ADMINISTRATIVE PROCESS YOU GET A HEARING?

MR. BOND: I HAVE BEEN ASKING FOR IT FOR MONTHS, AND THE FIRST TIME I SEE ANY RESPONSE FROM THEM AT ALL IS IN THIS COURT. THAT'S WHY WE'RE HERE. THEREFORE, YOUR HONOR, THE TAX INJUNCTION ACT UNDER 28 U.S.C. 1341 DEFENSE RAISED BY THE DEFENDANTS DOES NOT APPLY IN THIS CASE IN THIS CAUSE OF ACTION AND IS WITHOUT MERIT. WINN V. KILLIAN, SUPRA; HIBBS V. WINN, SUPRA.

THE EXHAUSTION ISSUE, YOUR HONOR, ON THE EXHAUSTION ISSUE DEFENDANTS CLAIM THAT THE COMPLAINT FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED BECAUSE I DID NOT EXHAUST MY ADMINISTRATIVE REMEDIES.

THE COURT: SIR, ALTHOUGH I DISCUSS THOSE ISSUES, THIS OPINION REALLY GOES OFF ON THE WANT OF JURISDICTION BECAUSE THE APPLICATION OF THE TAX INJUNCTION ACT. AND YOU KNOW, WHETHER I AGREE WITH YOU ON THOSE ISSUES OR NOT, IT REALLY DOESN'T

SOLVE THE PROBLEM I SEE UNDER THE TAX INJUNCTION ACT. SAID ANOTHER WAY, IF YOU DON'T GET AROUND THE TAX INJUNCTION ACT, WE NEVER GET TO THESE OTHER ARGUMENTS.

MR. BOND: WELL, I INTEND TO GET AROUND IT OR TO PRESENT MY SIDE OF THE STORY, WHATEVER -- HOWEVER, YOU WANT TO CALL THAT. IT'S NOT THE -- I'M NOT ATTACKING THE TAX INJUNCTION ACT AS IT'S WRITTEN THERE, I GUESS. I DON'T KNOW HOW I WANT TO SAY THAT. WHAT I'M SAYING IS I'M ASKING FOR PROSPECTIVE RELIEF. AND THAT'S NOT BARRED BY THE TAX INJUNCTION ACT.

PRIOR TO THE FILING OF THIS COMPLAINT, THE DEFENDANTS NEVER PROVIDED ME WITH ANY KIND OF PROCESS OR REMEDY TO RESOLVE THESE FINDINGS OR CONCLUSIONS. I REPEATEDLY REQUESTED THE FTB FOR ADMINISTRATIVE REVIEW AND A DUE PROCESS HEARING IN ORDER TO CHALLENGE THE RETURNS IN QUESTION. I RESPONDED TO THE FTB'S FINDINGS AND DEMONSTRATED THAT THE RETURNS IN QUESTION WERE NOT FRIVOLOUS OR INVALID. THE FTB NEVER REBUTTED MY DEFENSES NOR DID THE FTB PROVIDE A PROCESS OR REMEDY IN ORDER TO CHALLENGE THEIR FILINGS. IT WAS THE DEFENDANTS WHO FAILED TO PROVIDE AN ADMINISTRATIVE REMEDY.

THE DEFENDANT'S ACTIONS, YOUR HONOR, AND INACTIONS VIOLATED MY DUE

PROCESS RIGHTS AND HAVE VIOLATED MY PROCEDURAL DUE PROCESS. AND THAT'S IN MATTHEWS V. ELRIDGE, SUPRA; MORRISEY V. BREWER, 1972, 92 SUPREME COURT 2593, AND MULLANE V. CENTRAL HANOVER BANK AND TRUST, SUPRA.

YOUR HONOR, THE DEFENDANT'S ASSERTION THAT I FAILED TO EXHAUST AN ADMINISTRATIVE IS WHOLLY WITHOUT MERIT. PRIOR TO THE FILING OF THIS COMPLAINT, DEFENDANTS NEVER PROVIDED THIS ADMINISTRATIVE REMEDY.

YOUR HONOR, IN RESPECT TO COUNSEL'S ARGUMENTS UNDER PARAGRAPH 4 AND 5 CONCERNING THE ABSOLUTE AND QUALIFIED IMMUNITY ISSUE, I'LL PRESENT MY ARGUMENT TOGETHER. DEFENDANT'S ASSERTION AND DEFENSE THAT THEY ARE ENTITLED TO ABSOLUTE AND QUALIFIED IMMUNITY IS INCORRECT. GOVERNMENT OFFICIALS ENJOY ABSOLUTE OR QUALIFIED IMMUNITY FROM CIVIL DAMAGES UNLESS THEIR CONDUCT VIOLATES CLEARLY ESTABLISHED STATUTE OR CONSTITUTIONAL RIGHTS OF WHICH A REASONABLE PERSON WOULD HAVE KNOWN. HARLOW V. FITZGERALD.

THE COURT: WHAT SUPREME COURT OR 9TH CIRCUIT CASE SAYS THAT AN ADMINISTRATIVE BODY SUCH AS THE FRANCHISE TAX BOARD HAS TO PROVIDE YOU AN ADMINISTRATIVE APPEAL?

MR. BOND: AD ADMINISTRATIVE APPEAL OR DUE PROCESS HEARING?

THE COURT: AN APPEAL SUCH AS THE KIND YOU ARE ASSERTING YOU ARE ENTITLED TO. WHAT SUPREME COURT CASE OR WHAT 9TH CIRCUIT CASE SAYS THAT THEY HAVE TO DO THAT?

MR. BOND: UNLESS THEIR CONDUCT VIOLATES CLEARLY ESTABLISHED STATUTORY CONSTITUTIONAL LAW.

THE COURT: I'M ASKING YOU WHAT SUPREME COURT CASE HAS TAKEN THE FIFTH AMENDMENT DUE PROCESS OR THE FIFTH AMENDMENT DUE PROCESS CLAUSE AS APPLIED VIA THE 14TH AMENDMENT AND SAID SPECIFICALLY, AS A MATTER OF FEDERAL DUE PROCESS, YOU HAVE A RIGHT TO AN ADMINISTRATIVE HEARING SUCH AS YOU'RE ASSERTING YOU ARE ENTITLED TO? WHAT SUPREME COURT CASE SAYS THAT OR WHAT 9TH CIRCUIT CASE SAYS THAT?

MR. BOND: RIGHT OFFHAND, I'M NOT SURE, YOUR HONOR.

THE COURT: ISN'T IT THE CASE THAT IN DETERMINING WHETHER THERE IS A CLEARLY ESTABLISHED RIGHT, WE LOOK TO THE DECISIONS OF THE SUPREME COURT AND PERHAPS THE DECISION OF THE 9TH CIRCUIT?

MR. BOND: YES, SIR, WE DO. AND THE CONSTITUTION OF THE UNITED STATES. IF AN ORGANIZATION -- AND I DON'T CARE IF IT'S JOHN DOE'S TIRE SHOP OR FRANCHISE TAX BOARD OR ANYONE ELSE -- TRIES TO TAKE YOUR PROPERTY, AREN'T YOU ALLOWED A DUE PROCESS OF LAW HEARING? THAT'S A CONSTITUTIONAL RIGHT.

THE COURT: WELL, THAT'S A DIFFERENT ISSUE, TAKE YOUR PROPERTY. BUT WHAT I'M ASKING YOU IS WHAT SUPREME COURT OR 9TH CIRCUIT CASE SAYS YOU ARE ENTITLED TO THE TYPE OF ADMINISTRATIVE HEARING THAT YOU ARE ASSERTING HERE. AND ISN'T THE SIGNIFICANCE OF THAT, THAT IF THERE ARE SUPREME COURT CASES THAT CLEARLY SAY THAT, OR 9TH CIRCUIT CASES THAT CLEARLY SAY THAT, AND THE PUBLIC OFFICIALS WHO SHOULD BE ON NOTICE OF WHAT THE LAW IS IGNORED THOSE CLEARLY ESTABLISHED RIGHTS, YES, THEN THEY'RE NOT ENTITLED, AT LEAST UNDER THAT LEG OF THE ANALYSIS, TO QUALIFIED IMMUNITY.

BUT TO BEGIN WITH, TO ASSERT THAT THEY'RE NOT, YOU HAVE GOT TO COME UP WITH A CLEARLY ESTABLISHED RIGHT VIA THE SUPREME COURT OR THE 9TH CIRCUIT.

MR. BOND: OR THE CONSTITUTION.

THE COURT: NO, NO, NO, SIR. IT'S NOT ENOUGH TO SAY THE FIFTH AMENDMENT IS

THERE OR THE FIFTH AMENDMENT VIA THE 14TH AMENDMENT PROVIDES YOU A RIGHT TO DUE PROCESS. THE THEORY IS, THESE OFFICIALS HAVE TO BE ON NOTICE THAT THERE IS NOT JUST SOME ABSTRACT PRINCIPLE OUT THERE. BUT THE CASE LAW SAYS THIS PRINCIPLE APPLIES AND GIVES THE TAXPAYER THIS RIGHT. WHERE IS THAT AUTHORITY?

MR. BOND: RIGHT OFFHAND, I DON'T KNOW, SIR. I'LL HAVE TO LOOK IT UP. EVERY CORRESPONDENCE THAT I HAVE GOTTEN FROM THE FTB, NO MATTER WHO IT WAS, I HAVE REPEATEDLY ASKED FOR AN ADMINISTRATIVE HEARING AND A DUE PROCESS HEARING. I HAVE NEVER BEEN AFFORDED EITHER. NOT ONCE. NOT ONE WORD FROM THEM. ALL I GET IS ANOTHER LETTER SAYING THEY'RE GOING TO TAKE PROPERTY. THEY HAVE NEVER ONCE AFFORDED ME A HEARING UNTIL AFTER I BROUGHT THIS SUIT. TOO LATE.

AND TO ME, A REASONABLE PERSON SHOULD HAVE KNOWN, CITED IN HARLOW V. FITZGERALD, 457 U.S. 800. HERE, I'M SAYING THE DEFENSE ENJOY NO SUCH IMMUNITIES. I HAVE SHOWN THE DEFENDANTS HAVE VIOLATED CLEARLY ESTABLISHED CONSTITUTIONAL RIGHTS AND A DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT AS ESTABLISHED BY THE SUPREME COURT IN MATTHEWS V. ELRIDGE, SUPRA; MORRISEY V.BREWER, SUPRA; MULLANE V. CENTRAL HANOVER BANK, SUPRA; AND THE FREE SPEECH CLAUSE OF THE

FIRST AMENDMENT AS ESTABLISHED BY THE SUPREME COURT IN HUSTLER MAGAZINE V. FARWELL, 485 U.S. 46.

FURTHER' YOUR HONOR, THE DEFENDANTS HAVE KNOWN ALL ALONG THAT I WAS INVOKING THESE CLEARLY ESTABLISHED CONSTITUTIONAL RIGHTS. THE RECORD WILL SHOW THAT I CHALLENGED THE DEFENDANTS ON THESE CONSTITUTIONAL RIGHTS. IT'S IN THE APPENDIX THAT IS ATTACHED TO THE COMPLAINT.

SOME FACTUAL ISSUES, I REPEATEDLY REQUESTED THE FTB FOR AN ADMINISTRATIVE REVIEW AND FOR A DUE PROCESS HEARING IN ORDER TO CHALLENGE THEIR FINDINGS AND CONCLUSIONS CONCERNING THE TAX RETURNS. I RESPONDED TO THE FTB'S FINDINGS AND DEMONSTRATED THAT THE RETURNS IN QUESTION WERE NOT FRIVOLOUS OR INVALID. THE FTB NEVER –

THE COURT: SIR, I APPRECIATE THAT SORT OF CHRONOLOGY HERE, BUT ARE THERE ANY OTHER LEGAL ARGUMENTS YOU WANT TO PRESENT?

MR. BOND: I'M ALSO SAYING THEY VIOLATED MY FIFTH AMENDMENT RIGHT TO DUE PROCESS, MY FIRST AMENDMENT RIGHT TO FREE SPPECH BY PENALIZING ME FOR WRITING "ALL RIGHTS RESERVED" IN A JURAT ON THE TAX RETURNS IN QUESTION. AND IN TODD V. U.S. 849 F.2D 365, WHICH IS A 9TH CIRCUIT CASE,

1998, THE GOVERNMENT CONCEDED THAT THE TAXPAYER SHOULD NOT HAVE BEEN PENALIZED FOR WRITING, "SIGNED INVOLUNTARY UNDER PENALTY OF STATUTORY PUNISHMENT" BELOW THE JURAT.

YOUR HONOR, UNDER TODD, IT'S A VIOLATION OF THE FIRST AMENDMENT RIGHT TO CONLCUDE THAT WRITING "ALL RIGHTS RESERVED" IN A JURAT WOULD VIOLATE THE JURAT AND MAKE THE RETURN FRIVOLOUS OR INVALID. ONLY INACCURATE OF INCOMPLETE INFORMATION ON A RETURN WOULD CONSTITUTE A FRIVOLOUS RETURN. EXPRESSING THE WRITING OF "ALL RIGHTS RESERVED" IN A JURAT WAS AN INVOCATION OF MY FIRST AMENDMENT RIGHT TO FREE SPEECH.

YOUR HONOR, THE RIGHT TO FREE SPEECH IS A CLEARLY ESTABLISHED CONSTITUTIONAL RIGHT. CASES ARE TOO NUMEROUS TO CITE. IN HUSTLER V. FARWELL, SUPRA, CHIEF JUSTICE REHNQUIST ELOQUENTLY STATED, "AT THE HEART OF THE FIRST AMENDMENT IS A RECOGNITION OF THE FUNDAMENTAL IMPORTANCE OF THE FREE FLOW OF IDEAS AND OPINIONS ON MATTERS OF PUBLIC INTEREST AND CONCERN. THE FREEDOM TO SPEAK ONE'S MIND IS NOT ONLY AN ASPECT OF INDIVIDUAL LIBERTY AND THUS A GOOD UNTO ITSELF, BUT ALSO IS ESSENTIAL TO THE COMMON QUEST FOR TRUTH AND VITALITY OF SOCIETY AS A WHOLE."

CITATIONS ARE OMMITTED. WE HAVE THEREFORE BEEN PARTICULARLY VIGILENT TO ENSURE THE INDIVIDUAL EXPRESSION OF IDEAS REMAIN FREE FROM GOVERNMENTAL-IMPOSED SANCTIONS. DEFENDANT'S IMMUNITY DEFENSES ARE WITHOUT MERIT.

YOUR HONOR, ON THE RULE EIGHT ISSUE UNDER PARAGRAPH 6 –

THE COURT: I RULED FOR YOU ON THE RULE EIGHT ISSUE.

MR. BOND: YES, SIR. I DID SEE THAT. IN CONCLUSION, YOUR HONOR, FOR THE FOREGOING REASONS, THE DEFENDANT'S MOTION TO DISMISS THE COMPLAINT IS WITHOUT MERIT AND MUST BE OVERRULED. MY COMPLAINT IS PROPER BEFORE THIS COURT AND I'M ENTITLED TO MY DAY IN COURT.

THE COURT: THANK YOU, SIR.

MR. BOND: THANK YOU.

THE COURT: MR. BRUGUERA, I JUST HAVE ONE QUESTION FOR YOU.

MR. BRUGUERA: YES, YOUR HONOR.

THE COURT: WOULD YOU FOCUS ON THE REMEDIES, EITHER ADMINISTRATIVE, OR IN SUPERIOR COURT THAT ARE OPEN TO MR. BOND.

MR. BRUGUERA: YES, YOUR HONOR. MR. BOND IS REQUIRED TO COMPLETE HIS ADMINISTRATIVE PROCEDURE. AND THEN IF HE'S DISSATISFIED WITH THE OUTCOME OF THAT, HE CAN –

THE COURT: TELL ME WHAT THE ADMINISTRATIVE PROCEEDING IS THAT HE IS ENTITLED TO BEFORE THE FRANCHISE TAX BOARD.

MR. BRUGUERA: WELL, THERE IS ACTUALLY TWO DIFFERENT THINGS GOING ON AT THIS POINT. ONE IS THE RETURN HE FILED HAS NOT BEEN ACCEPTED AS VALID. AND IN THE ABSENCE OF A VALID RETURN, THEN THE FRANCHISE TAX BOARD HAS ISSUED A FINAL NOTICE BASED ON THE INFORMATION THEY DID HAVE. THEY ESTIMATED HIS TAXES AND HE CAN CHALLENGE THAT FINAL NOTICE, YOUR HONOR.

THE COURT: HOW?

MR. BRUGUERA: ADMINISTRATIVELY HE CAN TAKE IT UP WITH THE FRANCHISE TAX BOARD.

THE COURT: DOES HE HAVE ANY REMEDIES IN SUPERIOR COURT AT THIS POINT?

MR. BRUGUERA: ONCE HE'S COMPLETED HIS ADMINISTRATIVE PROCESS AND THE FINAL NOTICE HAS BEEN ISSUED, YES, HE CAN GO TO SUPERIOR COURT.

THE COURT: THANK YOU VERY MUCH.

MR. BRUGUERA: THANK YOU, YOUR HONOR. WE APPRECIATE THE EFFORT THAT WENT INTO THAT VERY LONG AND WELL-REASONED OPINION.

MR. BOND: ONE MORE THING, YOUR HONOR.

THE COURT: I'LL GIVE YOU ONE MINUTE, BUT YOU NEED TO RESPOND DIRECTLY TO WHAT MR. BRUGUERA SAID, NOTHING NEW.

MR. BOND: MY BACK IS TO HIM BECAUSE I COULDN'T HEAR HIM VERY WELL AND I AM DEAF IN MY RIGHT EAR.

THE COURT: HE INDICATED THAT YOU COULD CHALLENGE THE FINAL NOTICE THAT THE FRANCHISE TAX BOARD HAS ISSUED BEFORE THE FRANCHISE TAX BOARD. HE ALSO INDICATED THAT IF YOU ARE NOT SATISFIED WITH THAT, ONCE YOU HAVE DONE THAT, IF YOU ARE NOT SATISFIED WITH THEIR RULING, YOU CAN CONTEST THAT RULING IN SUPERIOR COURT.

MR. BOND: WELL, YOUR HONOR, I HAVE GOTTEN FINAL NOTICES FROM THE FRANCHISE TAX BOARD.

THE COURT: HAVE YOU CHALLENGED THEM BEFORE THE FRANCHISE TAX BOARD?

MR. BOND: I HAVE SENT MY RESPONSE TO EVERY ONE OF THEM ASKING FOR AN ADMINISTRATIVE HEARING AND DUE PROCESS HEARING. NOT ONCE DID I GET A LETTER SAYING I WOULD GET THAT.

THE COURT: HAVE YOU GONE TO SUPERIOR COURT TO TEST THE FACT AS YOU ASSERT, THAT YOU HAVE ASKED FOR A HEARING ON THE FINAL NOTICE AND THEY DIDN'T GIVE IT TO YOU? HAVE YOU GONE TO SUPERIOR COURT TO DO THAT?

MR. BOND: NO, I HAVE NOT.

THE COURT: WELL –

MR. BOND: THAT'S WHY I'M HERE.

THE COURT: THE TENTATIVE IS GOING TO BE THE ORDER OF THE COURT, SIR. I FEEL THAT THE TAX INJUNCTION ACT BARS YOUR ACTION. SOME PARTS OF IT, AT LEAST AGAINST THE INDIVIDUALS, SURVIVE, THE 11TH AMENDMENT DEFENSE AND CERTAIN OTHER DEFENSES. BUT WHEN WE TURN TO THE TAX INJUNCTION ACT, I BELIEVE THAT THE PROCEDURES YOU ATTACK ARE COVERED BY THE TAX INJUNCTION ACT AND THE ONLY QUESTION THEN BECOMES, DO YOU HAVE A REMEDY EITHER BEFORE THE FRANCHISE TAX BOARD ACTS OR AFTER THEY ACT. AND I BELIEVE THAT YOU HAVE SUCH A

REMEDY, AND FOR THAT REASON THE TAX INJUNCTION ACT IS APPROPRIATELY APPLICABLE.

SIR, LET ME SAY THIS: I AGREE WITH YOU. YOU ARE ENTITLED TO YOUR DAY IN COURT. BUT IT'S NOT THIS COURT. I THINK YOU IF YOU WISH TO PURSUE THROUGH THE FRANCHISE TAX BOARD OR THE SUPERIOR COURT, I BELIEVE YOU ARE ENTITLED TO YOUR DAY IN COURT. BUT IT'S NOT THIS COURT.

I ALSO WOULD SAY TO YOU, SIR, THAT YOU WOULD BENEFIT GREATLY FROM THE ASSISTANCE OF COUNSEL. AS YOU CAN SEE FROM THE PAPERS THAT THE STATE FILED AND THE DISCUSSION HERE, THESE ARE COMPLICATED ISSUES. THE 11TH AMENDMENT IS NOT SOMETHING THAT THE MAN ON THE STREET IS INTIMATELY FAMILIAR WITH. THE APPLICABILITY OF THE TAX INJUNCTION ACT IS NOT SOMETHING-THE MAN ON THE STREET IS INTIMATELY FAMILIAR WITH OR LIKELY TO BECOME INTIMATELY FAMILIAR SIMPLY BY PICKING UP THE STATUTE. AND I SAY THAT WITHOUT REGARD TO WHETHER SOMEONE HAS A COLLEGE EDUCATION OR EVEN ADVANCE DEGREE. LAW IS A FIELD UNTO ITSELF, AND THESE ISSUES ARE COMPLICATED ISSUES EVEN WITHIN THE ISSUE OF LAW.

SO I WOULD STRONGLY SUGGEST TO YOU, SIR, THAT IF YOU ARE GOING TO PROCEED FURTHER, YOU'D GREATLY BENEFIT FROM THE

ASSISTANCE OF COUNSEL.

ANYTHING FURTHER FOR TODAY?

MR. BRUGUERA: NO, YOUR HONOR. SHOULD I SUBMIT AN ORDER?

THE COURT: THIS WILL BE THE ORDER.

MR. BRUGUERA: ALL RIGHT. THANK YOU.

THE COURT: THANK YOU.

MR. BOND: YOUR HONOR, I'D LIKE TO LET THE COURT KNOW I INTEND TO APPEAL THE DECISION. I WOULD LIKE FOR THE PEOPLE AT THE TABLE OVER HERE TO IDENTIFY THEMSELVES. COULD I ASK FOR THAT?

THE COURT: WELL, I'LL DO IT. I DON'T KNOW THAT YOU ARE ENTITLED TO. THIS IS MS. HOLLY TATE, MY LAW CLERK.

MR. BOND: THANK YOU.

THE COURT: SIR, IF YOU ARE GOING TO APPEAL, LET ME JUST SAY AGAIN YOU MIGHT BENEFIT FROM THE ASSISTANCE OF COUNSEL IN TERMS OF KNOWING HOW AND WHEN AND WHAT TO DO AND WHAT TO SAY IN THE APPELLATE PROCESS. OKAY.

MR. BOND: YES, SIR.

MR. BRUGUERA: THANK YOU.

THE COURT: THANK YOU.

(WHEREUPON THE PROCEEDINGS WERE ADJOURNED.)

C E R T I F I CAT E

I HEREBY CERTIFY THAT THE FOREGOING MATTER IS TRANSCRIBED FROM THE STENOGRAPHIC NOTES TAKEN BY ME AND IS A TRUE AND ACCURATE TRANSCRIPTION OF THE SAME.

DATED: FEBRUARY 14, 2005
MARIA BEESLEY-DELLANEVE, CSR-RPR
OFFICIAL COURT REPORTER
LICENSE NO. 9132

EXHIBIT "C"
NINTH CIRCUIT'S MEMORANDUM DECISION

FILED

MAR 29 2006

CATHY A CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHARLES H. BOND, Plaintiff—Appellant, v. FRANCHISE TAX BOARD; et al., Defendant—Appellees.	No. 05-55197 D.C. No. CV-04-00887-JVS MEMORANDUM*

Appeal from the United States District Court
For the Central District of California
James V. Selna, District Judge, Presiding

Submitted March 8, 2006 **

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2)

Before: CANBY, BEEZER, and KOZINSKI, Circuit Judges.

Taxpayer Charles H. Bond appeals pro se from the district court's judgment dismissing his action challenging the California Franchise Tax Board's assessment of tax liabilities for tax years 2000-2003. Bond also sought declaratory and injunctive relief. We have jurisdiction pursuant to 28 U.S.C. § 1291. We review de novo dismissals for lack of subject matter jurisdiction. *Montes v. United States*, 37 F.3d 1347, 1351 (9th Cir. 1994), as well as dismissals for failure to state a claim, *Kimes v. Stone*, 84 F.3d 1121, 1126 (9th Cir. 1996). We affirm.

Because California offers a "plain, speedy and efficient remedy" in its courts for state tax appeals, *see Jerron West, Inc. v. State of Cal. State Bd. Of Equalization,* 129 F.3d 1134, 1138-1139 (9th Cir. 1998), the district court properly dismissed Bond's claims seeking declaratory and injunctive relief. *See* 28 U.S.C § 1341.

The district court also properly dismissed Bond's remaining claims because the defendant state agency is not a "person" under 42 U.S.C. §§ 1983 or 1985, *see Will v Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989), and it is entitled to Eleventh Amendment immunity, *see Mitchell v. Franchise Tax Board (In re Mitchell)*, 209 F.3d 1111, 1115-16 (9th Cir. 2000).

Bond's remaining contentions lack merit.

Bond's request for sanctions is denied.

AFFIRMED